Supreme Court, U.S.
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No. 08-811

IN THE

Supreme Court of the United States

ABAYOMI ADEDIJI,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Double Jeopardy protects a defendant, who was tried for the single offense of first degree murder under two different counts requiring different factual elements and convicted of only one count of first degree murder, against retrial on both murder counts, including the count that the defendant was not convicted and sentenced in the first trial.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

The opinion of the Appellate Court of Illinois, First Judicial District No. 07-2559 (June 3, 2008) (App., *infra*, 1a-6a) is unreported. The September 24, 2008, order denying the petition for leave to appeal to the Supreme Court of Illinois (App., *infra*, 7a) is also unreported.

BASIS FOR JURISDICTION

On January 10, 2007, the Illinois Appellate Court reversed the conviction of Defendant Abayomi Adediji and remanded the case for trial.[1] On June 20, 2007, Defendant moved the trial court to bar his re-prosecution of the felony murder count because it constituted a violation of his Constitutional rights against Double Jeopardy. On August 6, 2007, following a hearing, the trial court denied Defendant's motion. On August 31, 2007, Defendant filed an appeal of the denial of his Double Jeopardy motion under Illinois Supreme Court Rule 604(f). On June 3, 2008, the First District Appellate Court issued its Order affirming the trial court's order. On July 3, 2008, Defendant petitioned for leave to appeal to the Illinois Supreme Court. The Illinois Supreme Court denied Defendant's Petition for Leave to Appeal on September 24, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

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1. The Illinois Appellate Court held that, based on the evidence presented at the first trial, the jury should have received an instruction on involuntary manslaughter.

CONSTITUTION AND STATUTES INVOLVED IN THE CASE

U.S. Const., amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land of naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The relevant provisions of 720 ILCS 5/3-4, 720 ILCS 5/9-1, and 720 ILCS 5/18-2 are reprinted in the appendix to this petition at App., *infra*, 8a-25a.

STATEMENT OF THE CASE

1. Defendant was subject to jeopardy when, on March 23, 2004, the jury was sworn in to hear the trial of Defendant on charges of knowing bodily harm murder (under 720 ILCS 5/9-1(a)(2)), felony murder (under 720 ILCS 5/9-1(a)(3)), and armed robbery (under 720 ILCS 5/18-2). At the end of a three day trial, the jury was charged with the three counts and returned a verdict. On March 25, 2004, Defendant was found guilty of murder and armed robbery by the jury. The jury returned a single guilty verdict on first degree murder. The verdict did not distinguish between knowing bodily harm murder under 720 ILCS 5/9-1(a)(2) and felony murder under 720 ILCS 5/9-1(a)(3). Under Illinois law, the three subsections defining intentional murder (720 ILCS 5/9-1(a)(1)), knowing bodily harm murder (under 720 ILCS 5/9-1(a)(2)), and felony murder (under 720 ILCS 5/9-1(a)(3)) are considered a single offense. *See People v. Daniels*, 187 Ill. 2d 301, 313, 718 N.E. 2d 149, 158 (1999) (citing *People v. Allen*, 56 Ill. 2d 536, 543, 309 N.E. 2d 544 (1974)).

2. The People argued that the conviction required consecutive sentences for the murder and armed robbery charge. Defendant objected to the consecutive sentencing. The trial court sentenced Defendant to fifty years for knowing bodily harm murder (under 720 ILCS 5/9-1(a)(2)) and ten years for armed robbery (under 720 ILCS 5/18-2), with the sentences to run consecutively. No conviction or sentence was entered on felony murder under 720 ILCS 5/9-1(a)(3). Defendant sought reconsideration of the sentencing including the consecutive sentences.

3. At sentencing, the trial court stated: "I will be entering sentence on Count 5 for the offense of first degree murder and Count 10, armed robbery." Count 5 of the Indictment was knowing bodily harm murder under 720 ILCS 5/9-1(a)(2). Count 10 of the Indictment was armed robbery under 720 ILCS 5/18-2. No conviction or sentence was entered on Count 6, felony murder under 720 ILCS 5/9-1(a)(3). Neither party objected to the trial court's entry of sentence on only Counts 5 and 10. Neither party filed a post-sentencing motion objecting to the conviction. The Order of Commitment and Sentence to Illinois Department of Corrections reflecting the trial court's sentence for knowing bodily harm murder under 720 ILCS 5/9-1(a)(2) and armed robbery under 720 ILCS 5/18-2 was entered on May 17, 2004.

4. On January 10, 2007, the Illinois Appellate Court reversed Defendant's conviction and remanded it for trial. On June 20, 2007, Defendant moved the trial court to bar his re-prosecution of the felony murder count because it constituted a violation of his Constitutional rights against Double Jeopardy. On August 6, 2007, following a hearing, the trial court denied Defendant's motion. On August 31, 2007, Defendant filed an appeal of the denial of his Double Jeopardy motion under Illinois Supreme Court Rule 604(f). On June 3, 2008, the First District Appellate Court issued its Order affirming the trial court's order. The Illinois Supreme Court denied Defendant's Petition for Leave to Appeal on September 24, 2008.

5. Defendant was put in jeopardy for the felony murder count when the jury was sworn in to hear the trial. *Crist v. Bretz*, 437 U.S. 28, 35 (1978). After the jury

verdict, the People requested consecutive sentences for murder and armed robbery, a sentencing that is inconsistent with a conviction for felony murder under Illinois law. *See People v. Smith*, 183 Ill. 2d 425, 431-32 (1998) citing *People v. King*, 66 Ill. 2d 551 (1977) (declaring that multiple convictions and consecutive sentences are improper if they are based on lesser included offenses). The Illinois Supreme Court interpreted the Illinois law in *Smith* and *King* as prohibiting convictions for both felony murder and the predicate felony and prohibiting consecutive sentencing for felony murder and the predicate felony. The trial court granted the People's request for consecutive sentences and entered a conviction only on the knowing bodily harm murder and armed robbery, sentencing the Defendant to consecutive terms. Jeopardy ends when the final order of the trial court is entered. *Green v. United States*, 355 U.S. 184, 191 (1957). Conviction and sentencing is the final order of the criminal court in the State of Illinois. *People v. Dixon*, 91 Ill. 2d 346, 352 (1982).

6. Defendant's conviction and sentence, as requested by the People, did not include the felony murder count. Having once been placed at jeopardy for the felony murder count, retrial of Defendant for felony murder under 720 ILCS 5/9-1(a)(3) is a violation of the Double Jeopardy Clause of the United States Constitution. *U.S. Const., amend. V*; *see Green*, 355 U.S. at 190-91.

7. The Order of the Illinois Appellate Court is in violation of this Court's decision in *Green*, and the United States Court of Appeal for the Seventh Circuit's opinion in *Wilson v. Meyer*, 665 F.2d 118 (7th Cir. 1981), which interpreted *Green* as applied to Illinois's "single" offense of first degree murder. Defendant was not convicted and sentenced on the felony murder count. Under *Green* and *Wilson v. Meyer*, the failure to convict on a count for which jeopardy attached is the same as acquittal and Double Jeopardy bars retrial on that count. In *Wilson v. Meyer*, the Seventh Circuit held that a defendant could not be retried on felony murder under Illinois law because the original conviction did not include felony murder because the state moved to *nolle prosequi* the charge following the general jury verdict of guilty of first degree murder. The Order improperly relies on the Illinois Appellate Court's opinion in *People v. Ollie*, 333 Ill. App. 3d 971 (2002) which does not address the double jeopardy aspects of a reversal of a prior conviction.

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals Are in Conflict as to the Scope of a Defendant's Double Jeopardy Protection on Retrial for One of Multiple Factual Bases for Murder When the Multiple Factual Bases Support a "Single" Offense of Murder.

In general, the Double Jeopardy Clause does not apply to bar re-prosecution following a trial error that leads to reversal (*Burks v. United States*, 437 U.S. 1 (1978)); however, in certain circumstances, the results of the first trial prohibit the retrial on certain charges (*Green v. United States*, 355 U.S. 185 (1957); *Price v. Georgia*, 398 U.S. 323 (1970)). If the first trial ends without a conviction and sentence on all charges presented, the retrial of certain charges following reversal of the original judgment is barred by the Double Jeopardy Clause. *See, e.g., Green v. United States*, 355 U.S. 185 (1957); *Price v. Georgia*, 398 U.S. 323 (1970); *Terry v. Potter*, 111 F. 3d 454 (6th Cir. 1997); *Saylor v. Cornelius*, 845 F.2d 1401 (6th Cir. 1988); *Wilson v. Meyer*, 665 F. 2d 118 (7th Cir. 1981); *but see United States ex rel. Jackson v. Follette*, 462 F.2d 1041 (2d Cir. 1972).

Conviction on a lesser included offense in the first trial, with silence on the greater offense, bars retrial of the greater offense following a reversal of the first judgment. In *United States v. Green*, the United States Supreme Court held that the Double Jeopardy Clause precluded retrial on first degree murder. *United States v. Green*, 355 U.S. 185 (1957). In *Green*, the jury in the first trial was presented a choice of convicting the defendant of either first degree or second degree

murder. As a result of the first trial, Green was convicted and sentenced only on second degree murder. The defendant's second degree murder conviction was later overturned on appeal. The defendant was retried and convicted of first degree murder in the second trial. *Id.* at 186. The United States Supreme Court stated that the conviction on the second degree murder, when the defendant could have been convicted of first degree murder (but not both at the same time), precludes the later retrial on the first degree murder charge. *Id.* at 189-91; *see also Price v. Georgia*, 398 U.S. 323, 326-29 (1970) (conviction on lesser included offense manslaughter prohibits retrial of more serious crime of murder). This Court explained:

> Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder. But the result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given full opportunity to return a verdict and no extraordinary

> circumstances appeared which prevented it from doing so. Therefore, it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense.

Green, 355 U.S. at 190-91 (footnote omitted). In *Green*, the Double Jeopardy claim did not rest on the fact that the second degree murder charge was a lesser offense, but on the fact there was no conviction in the first trial for first degree murder. *Id.* at 194, n. 14.

The Double Jeopardy protections accorded a defendant who was convicted on one, but not all, counts of a single offense of first degree murder present additional issues. For example, if a defendant is tried on a "single" first degree murder count based on multiple counts requiring different factual proof, to what extent may the defendant be retried for first degree murder following a reversal of the first conviction? Does the failure to convict the defendant on one count presented to the first jury have a preclusive effect on the second trial for the "single" first degree murder charge? Or, is the state permitted to retry the defendant on all counts previously tried to the jury, even though the first trial did not result in a conviction on all of the counts presented? Is a Defendant forced to forego his right to be free from double jeopardy in order to exercise his right to appeal his conviction that contained a valid, misstep that merits reversal? The Seventh Circuit Court of Appeals and the Second Circuit Court of Appeals disagree on the extent of the defendant's Double Jeopardy protection on the retrial following the reversal

of the first conviction. In this area, the two Circuit Courts of Appeal both interpret this Court's decision in *Green*, but they reach contrary results.

In *Wilson v. Meyer*, 665 F. 2d 118 (7th Cir. 1981), the Seventh Circuit held that the People of the State of Illinois could not retry the defendant on felony murder where the court did not enter a judgment on the felony murder charge. In the first trial, the defendant in *Wilson* was found guilty by the jury of intentional murder, felony murder, and attempted burglary. The state moved to *nolle prosequi* the felony murder charge, and the court entered conviction only on the intentional murder and attempted burglary. *Id.* at 119. The court also entered a consecutive sentence on the intentional murder and attempted burglary, which it could not have done with the felony murder charge. *Id.* at 123 (the Seventh Circuit noted multiple motivations for the state to move to *nolle prosequi* the felony murder count including the acknowledgement of a greater sentence without the felony murder conviction).

Wilson's first degree murder conviction was overturned by the Seventh Circuit on a habeas action. Due to the *nolle prosequi*, the felony murder charge was not before the Seventh Circuit. *Id.* at 119. The People then retried Wilson on the intentional murder and felony murder counts. *Id.* at 120. The jury returned a verdict of guilty of first degree murder on a single verdict form that did not specify whether the verdict was for intentional murder or felony murder. *Id.* at 120, n.5.

The Seventh Circuit held that the second trial for felony murder was improper when the People did not press the conviction and sentence on the felony murder count in the first trial. In reversing the second conviction as a Double Jeopardy violation, after examining the possible reasons for the People dropping the felony murder count, the Seventh Circuit stressed the effect of eliminating the felony murder on Wilson. "The impact, however, not the motivation behind the State's act to *nolle prosequi* the felony murder count is what is important." *Id.* at 123. The Seventh Circuit stated that the effect was that the felony murder count could not be appealed and that only the intentional murder count survived the reversal. *Id.*

By contrast, the Second Circuit held that a defendant may be retried for first degree murder under both a premeditated murder count and a felony murder count, even though the defendant was not convicted of felony murder in the first trial. *United States ex rel. Jackson v. Follette*, 462 F.2d 1041 (2d Cir. 1972). Jackson was tried in front of a New York jury for first degree murder. At trial, the state presented two different counts of first degree murder, premeditated murder and felony murder. The jury was instructed that it could not return a guilty verdict on both theories of first degree murder. *Id.* at 1042-43. Jackson was convicted of premeditated murder at his first trial with no finding as to felony murder, but the conviction was overturned on appeal. *Id.* at 1043-44. At the second trial, Jackson was retried on both premeditated murder and felony murder. Jackson was convicted of felony murder at his retrial. *Id.* at 1044. The Second Circuit held that the conviction on the felony murder count in the second trial was not a violation of Double Jeopardy. *Id.* at 1049-50.

In contrast to the Second Circuit's opinion discussed above, the Sixth Circuit has held that where the jury took no action on a properly pled and instructed charge of murder, when the jury had the option of finding him guilty on that murder charge, the failure to convict should be treated as an acquittal. *Terry v. Potter*, 111 F.3d 454 (6th Cir. 1997) (declaring jury's failure to act on a charge of murder was, for Double Jeopardy purposes, the equivalent of an acquittal). Terry was tried for both intentional murder and wanton murder, two distinct charges under Kentucky law. The jury found Terry guilty of wanton murder, but no verdict was returned on the intentional murder. The Kentucky Supreme Court overturned Terry's conviction on wanton murder because the judgment was not supported by the evidence. *Id.* at 455. The state then retried Terry on the intentional murder charge. *Id.* at 456. In *Terry*, the Sixth Circuit discussed and followed the reasoning of *Green*, 355 U.S. at 188, where the United States Supreme Court weighed the different treatment of charges in which a jury is "silent" and found that the silence acts as an acquittal. *Terry*, 111 F.3d at 457. The Sixth Circuit recognized that its conclusion was contrary to the Second Circuit. *Id.* at 458 ("We realize that a Second Circuit decision reached the opposite conclusion in a similar case." citing *United States ex rel. Jackson v. Follette*). The Sixth Circuit explained the Double Jeopardy protections against multiple theories of the same murder count as follows:

> We recognize that if a charge of murder is brought under two legal theories, such as direct and accomplice liability, or two factual theories, such as shooting and stabbing, the

> reversal of a conviction based on only one of the theories may not bar retrial under the other theory. *See United States v. Garcia*, 938 F.2d 12, 15 (2d Cir. 1991). When a charge of murder is brought under two separate statutory subsections of a unitary offense, however, as in this case, jeopardy attaches separately as to each. *See United States v. Cavanaugh*, 948 F.2d 405 (8th Cir. 1991). The jury was discharged without convicting Terry of intentional murder, and now the Commonwealth may not again subject him to the same risk of conviction under Ky. Rev. Stat. 507.020(1). *See Price*, 398 U.S. at 326.

Id. at 459-460. The Ninth Circuit, for example, noticed the contrast between the Second Circuit's decision in *United States ex rel. Jackson v. Follette* versus the Seventh Circuit's decision in *Wilson v. Meyer*. *See, e.g.*, *Wilson v. Prunty*, 2000 U.S. App. Lexis 10969 (9th Cir. 2000) ("circuit courts have not been uniform in their treatment of retrials in unified murder cases similar to the one at hand," citing both cases). State Supreme Courts have held, based on the Second Circuit opinion, that failure to convict on a charge presented to the jury does not raise a double jeopardy bar on retrial of the same defendant. *Iowa v. Pexa*, 574 N.W. 2d 344 (Iowa 1998) (citing *United States ex rel. Jackson v. Follette* for the proposition that failure to consider an alternative theory does not raise Double Jeopardy concerns); *Commonwealth v. Nardone*, 546 N.E. 2d 349 (Mass. 1989) (same).

II. Double Jeopardy Principles Prohibit Retrying Defendant on Felony Murder Because Defendant Faced Trial on Felony Murder But Was NOT Convicted on That Charge.

A. The Illinois Appellate Court Ignored the Holdings of This Court and Other Federal Courts that Bar Reprosecution Here.

This case merits Certiorari because it shows the Illinois courts failing to uphold accepted constitutional principles in contrast to the decisions of this Court and the Seventh Circuit. *See* Rule 10(b)&(c). The Illinois Appellate Court erred by ignoring the holdings of the courts at many levels, including this Court, which have held that the Double Jeopardy Clause bars retrial where it impermissibly puts Defendant in jeopardy twice for the same offense. The Fifth Amendment of the United States Constitution states that any defendant is protected from being "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., amend. V. As this Court stated:

> The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.

Green v. United States, 355 U.S. at 187.

The Illinois Appellate Court failed to address three fundamental points from the prior holdings:

1. Jeopardy begins with the presentation of the charge to the jury and ends with the court entering the conviction, the final order of the trial court. *Green v. United States*, 355 U.S. 184 (1957); *Terry v. Potter*, 111 F.3d 454 (6th Cir. 1997); *Saylor v. Cornelius*, 845 F.2d 1401 (6th Cir. 1988); *Wilson v. Meyer*, 665 F.2d 118 (7th Cir. 1981).

2. Failure to convict on a charge presented to the jury bars later reprosecution. *See, e.g., Green v. United States*, 355 U.S. 184 (1957); *Price v. Georgia*, 398 U.S. 323 (1970); *Terry v. Potter*, 111 F.3d 454 (6th Cir. 1997); *Saylor v. Cornelius*, 845 F.2d 1401 (6th Cir. 1988); *Wilson v. Meyer*, 665 F.2d 118 (7th Cir. 1981).

3. Double jeopardy ensures the finality and fairness to defendants previously "being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green*, 355 U.S. at 187; *United States v. Wilson*, 420 U.S. 332, 343 (1974); *Price v. Georgia*, 398 U.S. 323 (1970).

Double Jeopardy is triggered when the defendant faces conviction at trial. *Green*, 355 U.S. at 187. In a jury trial, jeopardy attaches when the jury is empanelled and sworn. *Crist v. Bretz*, 437 U.S. 28, 35 (1978); *see also Daniels*, 187 Ill. 2d at 310. In Illinois, the final judgment in a criminal case is the sentence. *People v. Dixon*, 91 Ill.2d 346 (1982). In determining when Double Jeopardy

applies, the Illinois Appellate Court summarizes the Illinois law as follows:

> The final judgment in a criminal case is the imposition of sentence. (*People v. Dixon*, [91 Ill. 2d 346 (1982)]) The pronouncement of the sentence is the act which embodies the judgment of the court. (*People v. Allen*, [71 Ill. 2d 378 (1978)]) The sentence is a necessary part of a complete judgment of guilt. (*People v. Vaughn*, [92 Ill. App. 3d 913 (5th Dist. 1981)])

People v. Young, 116 Ill. App. 3d 984, 990 (1st Dist. 1983).

Most Federal courts have held that when a conviction is not entered for some charges presented to the jury but is entered for other charges the silence acts as an acquittal. *Green*, 355 U.S. at 190-91. In *Green*, the jury in the first trial was presented a choice of convicting the defendant of either first degree or second degree murder. As a result of the first trial, Green was convicted and sentenced only on second degree murder. The defendant's second degree murder conviction was later overturned on appeal. The defendant was retried and convicted of first degree murder in the second trial. *Id.* at 186. The United States Supreme Court stated that the conviction on the second degree murder, when the defendant could have been convicted of first degree murder (but not both at the same time), precludes the later retrial on the first degree murder charge. *Id.* at 189-91; *see also Price v. Georgia*, 398 U.S. 323, 326-29 (1970) (conviction on lesser included offense

manslaughter prohibits retrial of more serious crime of murder). This Court explained:

> Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder. But the result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore, it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense.

Green, 355 U.S. at 190-91 (footnote omitted). *See also Terry*, 111 F.3d at 457 (declaring jury's failure to act on a charge of murder was, for Double Jeopardy purposes, the equivalent of an acquittal); *Saylor*, 845 F.2d at 1404 (declaring the jury's finding of guilt on only one count

of murder in the face of three charges and theories of murder acted as a termination of jeopardy after defendant's first trial, barring retrial on the other two forms of murder in the second trial); *Wilson*, 665 F.2d at 123 (lack of conviction on felony murder count after the count was presented to the jury is bar to reprosecution). The common facts in all these cases is that the charges were presented to the jury (and thus jeopardy attached) and the barred charges were not included in the final order of the trial court (thus jeopardy closed without conviction). The cases do not require that the defendant was actually acquitted of the charge before the prior jeopardy bars reprosecution. *See Green*, 355 U.S. at 188 ("it is not even essential that a verdict of guilt or innocence be returned for a defendant to have been placed in jeopardy so as to bar a second trial on the same charge"). The fact that the defendant was previously in jeopardy and not convicted is sufficient to trigger the double jeopardy bar.

Because the final order is the conviction and sentence, Double Jeopardy bars reprosecution even when the jury finds the defendant guilty of the charge. In *Wilson*, the Seventh Circuit held that the effect of the *nolle prosequi* in removing the charge from the conviction after jeopardy had attached was to bar retrial on the count that was dismissed. *Wilson*, 665 F.2d at 123. Similarly, under Illinois law, the entering of a directed verdict for the defendant after a jury finding of guilty also acts as a bar on subsequent retrial on the same charge. *See, e.g., People v. Carter*, 194 Ill. 2d 88 (2000); *People ex rel. Daley v. Crilly*, 108 Ill. 2d 301, 308 (1985). Facing former jeopardy without the prior trial resulting in a conviction is enough to trigger double jeopardy concerns.

Double Jeopardy prohibits multiple trials of a defendant after a conviction or an acquittal to promote the finality and fairness of the original trial. *United States v. Wilson*, 420 U.S. at 342-43. Circuit Courts of Appeal have held that the act of retrial itself is the violation of the Double Jeopardy clause. *See, e.g., Booker v. Phillips*, 418 F.2d 424 (10th Cir. 1969); *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844 (2d Cir. 1965). Defendant faced trial on the felony murder count. After the jury verdict, the People could have requested a conviction and sentencing for the felony murder; however, it was the People that sought a conviction and consecutive sentences that were inconsistent with a conviction on felony murder. The consecutive sentences and the conviction for armed robbery both demonstrate that Defendant was not convicted of felony murder under 720 ILCS 5/9-1(a)(3). Separate convictions and consecutive sentences are not allowed for felony murder and the underlying felony on which the murder is based. "Under *People v. King*, [66 Ill. 2d 551 (1977)], multiple convictions are improper if they are based on less included offenses." *Smith*, 183 Ill. 2d at 432. In *Smith*, the Illinois Supreme Court vacated the defendant's conviction and sentence for the lesser included charge of armed robbery when the defendant was convicted of felony murder. *Id.* at 433 (citing *People v. Coady*, 156 Ill. 2d 531, 537 (1993) ("defendant correctly notes that armed robbery was the offense underlying the felony murder charge and, as an included offense, will not support a separate conviction and sentence") and *People v. Johnson*, 154 Ill. 2d 356, 370-72 (1993) (conviction and sentence of predicate felony vacated when defendant convicted and sentenced of felony murder)). *People v. Washington*, 272 Ill. App. 3d 913, 920 (1st Dist. 1995)

(the Double Jeopardy Clause prohibits punishment both for an offense and a lesser included offense); *see also People v. McLaurin*, 184 Ill. 2d 58 (1998) (Illinois Supreme Court merged felony murder counts based on residential burglary and aggravated arson into more serious murder count and vacated the predicate felony convictions of residential burglary and aggravated arson); *cf.* 720 ILCS 5/3-4(a) ("conviction of an included offense is an acquittal of the offense charged"). The trial court could not have convicted and sentenced Defendant on felony murder in this case.

The effect of the People's request was to close jeopardy on the felony murder count. The trial court entered the conviction and sentence the People requested. The conviction did not include the felony murder charge. The trial court did not indicate that it merged the felony murder count into the knowing bodily harm count. Even if the trial court's entering of the conviction was erroneous, the final order terminates jeopardy. *Sanabria v. United States*, 437 U.S. 54, 64 (1978) (Double Jeopardy applies even "where acquittal is based upon an egregiously erroneous foundation").

Jeopardy on felony murder had attached; Defendant was not convicted. Retrial of Defendant on felony murder is placing him in jeopardy twice for the same offense and is prohibited by the United States Constitutions.

B. The Illinois Appellate Court's Reliance on *Ollie* Was Misplaced.

The Illinois Appellate Court made a fundamental err relying on its opinion in *People v. Ollie*, 333 Ill. App. 3d 971 (2002) to affirm the trial court. The Illinois Appellate Court stated:

> "It is well-settled that, where an indictment contains several counts arising out of a single transaction and the jury returns a general verdict, the defendant is guilty as charged in each court to which the proof is applicable." *People v. Ollie*, 333 Ill. App. 3d 971, 988 (2002), quoting *People v. Kidd*, 178 Ill. 2d 92, 126 (1997). Moreover, where multiple convictions are obtained for offenses arising out of a single act, sentence is imposed on the most serious offense. *Ollie*, 333 Ill. App. 3d at 988. Intentional murder is deemed to be the most serious offense between felony murder and intentional murder. *Ollie*, 333 Ill. App. 3d at 988.
>
> Here, defendant was charged with both intentional murder and felony murder, as well as armed robbery. The jury returned a general verdict for murder and armed robbery, and he was sentenced on both charges. It necessarily follows, therefore, that defendant was convicted of felony murder and properly sentenced solely on the intentional murder count since that was the most serious offense of the two charges. Therefore, it does

> not violate double jeopardy for defendant to be retried on all of the counts, which includes felony murder.

App. at 5a-6a. The Court's analysis is misguided because *Ollie* did not address the effect of Double Jeopardy under retrial of a defendant following a reversal on appeal. In *Green*, failure to convict of a validly presented charge for which jeopardy attached is the same as an acquittal. *Green*, 355 U.S. at 194, fn. 14. Here Defendant faced jeopardy at his first trial for felony murder. The final order of his first trial did not include a conviction for felony murder and did not claim to be merging the felony murder into the knowing bodily harm murder. The failure to convict acts, for Double Jeopardy purposes, the same as an acquittal.

C. The Final Order from Defendant's First Trial, as Sought by the People, Prohibits Retrial of Defendant on Felony Murder.

The People may not put Defendant in jeopardy twice as a result of trial tactics subjecting Defendant to jeopardy and requesting that jeopardy close with a conviction on felony murder. The People's choice to pursue consecutive sentences comes at a cost of not being able to retry the Defendant on felony murder because the final order of the original trial court did not contain a conviction for felony murder. Here, Defendant is similarly situation as the defendant in *Saylor v. Cornelius* in that "the ending of the trial without a conviction of the defendant was certainly, in one sense, due to the actions of the prosecution." *Saylor*, 845 F.2d at 1407. The Eighth Circuit has applied this

principle to "hold that principles of double jeopardy, which serves 'a constitutional policy of finality for the defendant's benefit,' *United States v. Jorn*, [400 U.S. 470 (1971) (plurality)], bars retrial" in certain circumstances based on the prosecution's trial tactics. *United States v. Cavanaugh*, 948 F.2d 405 (8th Cir. 1991) (failure to submit charge to jury at first trial bars retrial on retrial); *see also United States v. Wilson*, 420 U.S. at 343. The People's actions at the first trial have consequences on retrial.

> To hold that a defendant waives his double jeopardy protection whenever a trial court error in his favor leads to an acquittal would undercut the adversary assumption on which our system of criminal justice rests, and would vitiate one of the fundamental rights established by the Fifth Amendment.

United States v. Wilson, 420 U.S. at 343 (citing *Sanabria*, 437 U.S. at 78)).

Jeopardy attached on the felony murder count when the jury was sworn in and jeopardy terminated when the final trial court order did not contain a conviction for the felony murder count. The trial court entered the conviction and sentence requested by the People. That final order terminated jeopardy on the felony murder count and any retrial on felony murder makes Defendant "twice put in jeopardy of life or limb."

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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